

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

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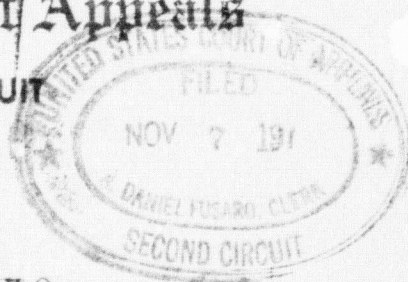
77-6099

To be argued by
MICHAEL G. CAVANAGH

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-6099



EDWARD G. SANTANGELO,

Plaintiff-Appellant,

—against—

JOSEPH A. CALIFANO, Secretary of Health,
Education and Welfare,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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BRIEF FOR THE APPELLEE

Preliminary Statement

Edward G. Santangelo appeals from an order of the United States District Court for the Eastern District of New York (George C. Pratt, *J.*) entered May 19, 1977, granting the motion of the defendant-appellee, the Secretary of Health, Education and Welfare (hereinafter the "Secretary") for a judgment on the pleadings in an action seeking a judicial review of the Secretary's denial of Santangelo's application for Social Security disability benefits. On appeal, Santangelo contends that the Secretary's decision is not supported by substantial evidence. He buttresses this point by contending that the Secretary, in reaching his decision, failed to consider Santangelo's subjective complaints, the combined effects of his alleged impairments, and a Veterans Administration determination that Santangelo was unemployable. In ad-

dition, Santangelo claims that the Secretary placed improper reliance on the testimony of a vocational expert who testified at his administrative hearing, and who did not see certain medical reports that were admitted into evidence, with the consent of Santangelo, subsequent to the administrative hearing.

Santangelo filed an application for a period of disability and for disability insurance benefits on July 23, 1973 (Tr. 54-57),¹ alleging that he became unable to work on March 15, 1972, at age 51. The application was denied initially (Tr. 58-59) and was likewise denied on reconsideration (Tr. 61) by the Bureau of Disability Insurance of the Social Security Administration. Santangelo then requested an administrative hearing before an Administrative Law Judge of the Bureau of Hearings and Appeals of the Social Security Administration (Tr. 21). The Administrative Law Judge, before whom Santangelo and a vocational expert appeared, considered the case *de novo*, and on June 16, 1975, found that Santangelo was not under a disability (Tr. 10-15). The Administrative Law Judge's decision became the final decision of the Secretary of Health, Education, and Welfare, when the Appeals Council approved the decision on August 27, 1975 (Tr. 4). Santangelo then sought judicial review of the Secretary's decision, pursuant to 42 U.S.C. § 405(g), in the United States District Court for the Eastern District of New York. On May 19, 1977 the District Court, the Honorable George C. Pratt presiding, affirmed the Secretary's decision. In his memorandum and order Judge Pratt upheld the Secretary's decision, finding that it was supported by substantial evidence.

¹ References in parenthesis are to pages in the administrative transcript which is contained in the Appendix.

Statement of Facts

Santangelo, a 56 year old bachelor with two years of college education, alleged that he had been entitled to Social Security disability benefits since March 15, 1972 due to deafness, back pain, and a "nervous condition". (Tr. 54, 81). Prior to April 19, 1972, Santangelo's last day of work, he had been employed for seven years as an assistant department head for First National City Bank, earning \$13,000 a year (Tr. 32, 74). For the 19 years preceding his employment with First National City Bank, Santangelo had worked for American Express, ultimately as an assistant inspector with supervisory responsibility for eighty employees (Tr. 32, 74).

The evidence in the administrative transcript for each of the alleged impairments was as follows:

Deafness

1. Santangelo expressed many subjective complaints about his hearing and how it adversely affected him (Tr. 72-75, 124). However, it should be noted that Santangelo stated that watching television and socializing with neighbors were two of his regular daily activities (Tr. 34-35, 124).

2. Dr. Philip Pross, Santangelo's treating general practitioner, stated in his three reports that Santangelo had a total loss of hearing in his left ear and a partial loss of hearing in his right and required continuous treatment for ear infections, apparently due to fungus. Dr. Pross did not state the cause of the hearing loss (Tr. 91-95, 109).

3. Subsequent to Santangelo's administrative hearing, he was sent by the Administrative Law Judge to Dr. Martin Rudoy, a consulting specialist in neurology and psychiatry (Tr. 44, 137). Dr. Rudoy found "diminished

hearing in the right ear and absence of hearing in the left ear". He noted that Santangelo "wore a hearing aid and was able to converse with me perfectly normally . . ." (Tr. 134).

4. Veterans Administration records state that Santangelo is completely deaf in his left ear and mildly deaf in his right and confirm that he has problems with fungus infections (Tr. 106-107).

5. Santangelo did not appear to have any hearing impairment during the administrative hearing (Tr. 26-53). Dr. Turkell, a consulting specialist in orthopedics, whose report will be discussed below, noted that Santangelo could hear him without his hearing aid when Santangelo had his back to the doctor (Tr. 125).

Sciatica and Back Pain

1. Santangelo testified that he suffered from sciatica² and a deterioration of a lumbar disc. He alleges that

²Sciatica is "[a] condition characterized by pain, tingling, and other abnormal sensations in the thigh, leg and foot. The cause is some kind of involvement of the sciatic nerve which is distributed to the lower limb. The involvement may be inflammation, pressure, injury, tension, etc. The sciatic nerve is the largest nerve in the body and enters the back of the thigh under the muscles of the buttock. It sends branches to nearly the whole of the skin of the leg, the muscles of the back of the thigh, and the muscles of the leg and foot.

Deformities of the lower end of the spine or any part along the long course of the nerve may lead to sciatica. Abnormal conditions of the sacroiliac joint (q.v.) may also affect the sciatic nerve. Pressure or strain on the nerve must in some cases be relieved by surgery.

Symptoms which seem to be attributable to the sciatic nerve are often, if not usually, caused by disorders within the spinal column. The commonest cause of all is a ruptured intervertebral disk. . . . Other causes are arthritis of the spine, overgrown ligaments, tumors of the spine, etc." *Schmidt's Attorney's Dictionary of Medicine*.

because of the sciatica it takes him thirty to forty-five minutes to just get out of bed, causes him recurrent pains and limits his ability to get around (Tr. 34, 39).

2. Santangelo stated that he takes Demerol for partial relief of the pain and that under doctor's orders he restricts himself "from doing any activities at all" and is "not supposed to travel." (Tr. 40, 51).

3. In Maracaibo, Venezuela, Santangelo apparently saw Dr. Libardo Ramirez, a physician and surgeon, whose report, dated December 31, 1974, stated that he treated Santangelo for back pain that radiated down his legs. Absent from Doctor Ramirez's report was any diagnosis or clinical findings as to the cause of the alleged pain (Tr. 102-103).

4. Dr. Pross diagnosed Santangelo's back condition as "deterioration of the lumbar disc and sciatica syndrome" but failed to support his conclusion with any clinical or medical data upon which it was based (Tr. 91-94).

5. Dr. Hyman Weiselberg, a specialist in radiology, x-rayed Santangelo's back and found only mild scoliosis and minimal spurring of three vertebrae (Tr. 122-123).

6. Dr. Jacob H. Turkell, a consulting specialist in orthopedic surgery, thoroughly examined Santangelo on May 3, 1975, at which time Santangelo admitted three times in Dr. Turkell's transcription of the examination that his back would not stop him from working and that he felt "fit as a fiddle." (Tr. 124-128). After examining Santangelo and reviewing the x-rays taken by Dr. Weiselberg, Dr. Turkell was of the opinion that Santangelo's back condition was "not a deterrent for pursuing physical duties required in gainful activities which he customarily did . . . [H]e is able to work, stand, sit, [and] use public transportation normally . . ." (Tr. 127).

7. Dr. Turkell at one point in his examination noted that Santangelo's canvas sacroiliac belt, which he claimed to have used since 1973, did not show the "wear and tear of constant usage." (Tr. 43, 125).

8. Veterans Administration medical records revealed that x-rays taken in October of 1973 showed some slight compression and recommended a lumbrosacal belt (Tr. 120).

Psychiatric

1. Santangelo on numerous occasions recounted his subjective complaints, attributed by him to his nervous condition, of irritability, uneasiness, inability to have a social life or function in a competitive work situation, anxiety, lapses into unconsciousness, dizziness and insomnia (Tr. 37, 40, 74-76). The Administrative Law Judge, a claims reviewer for Social Security and Dr. Ramirez all noted that Santangelo appeared to be anxious (Tr. 44, 78, 103). Three letters from friends of Santangelo included in the administrative transcript, all dated during the first week of 1972, recounted how Santangelo was a nervous person (Tr. 99-101).

2. One of the above mentioned letters noted how Santangelo still attends social gatherings (Tr. 101), and Santangelo on two occasions mentioned how socializing with friends and neighbors was an integral part of his daily activity (Tr. 35, 124).

3. Santangelo can cook for himself, read, go outside unassisted, and travel overseas (Tr. 35, 54, 102-103, 124-125).

4. The Veterans Administration rated Santangelo 50% disabled from July 13, 1972 as a result of anxiety neurosis (Tr. 106). This determination was apparently

based upon a neuropsychiatric examination of Santangelo by Dr. Walter Abeles. The doctor observed that, during examination, Santangelo was anxious and tense and diagnosed his condition as an anxiety neurosis which severely incapacitated him (Tr. 111-113). Dr. Abeles also noted, however, that there was "no evidence of delusional thinking, no hallucination, no impairment of memory or judgment" and that Santangelo was competent to handle his own affairs (Tr. 111-113).³

5. Because of the aforementioned 50% disability rating, based upon anxiety neurosis, and a 10% disability rating for Santangelo's hearing problems, the Veteran's Administration deemed Santangelo 100% disabled for reasons of unemployability and, at the time of the hearing before the Administrative Law Judge, was paying Santangelo \$584 per month in benefits (Tr. 47).⁴

6. Dr. Joseph Illovsky, a consulting psychiatrist, examined Santangelo on November 8, 1973. He found that he had a "[p]sychophysiologic disorder of special sense (hearing)" and a "certain amount of nervousness and depression, which incapacitates him to function" (Tr. 96-97). Dr. Illovsky also felt, however, that psychotherapy would alleviate his condition and that Santangelo was able to manage his own financial affairs (Tr. 97).⁵

³ Santangelo's brief erroneously contends on page 26 that the Administrative Law Judge did not permit the vocational expert who testified at the administrative hearing to review the report of Dr. Abeles. This assertion is not supported by the record. Dr. Fonda reviewed the evidence in Santangelo's file, which included Dr. Abeles' report, prior to the hearing. (Tr. 27, 45).

⁴ It should be noted that a conclusion by another government agency or by a physician that an individual is or is not disabled is not binding on the Secretary, 20 C.F.R. § 404.1525 and 20 C.F.R. § 404.1526.

⁵ An impairment that is amenable to treatment cannot provide the basis for granting disability benefits if the claimant fails to have the impairment treated, 20 C.F.R. § 404.1507.

7. A psychologist, Dr. Ann F. McHugh, examined Santangelo on May 3, 1975. She found him to be an "immature individual who is dependent, rigid, weakly separated, poorly related and lacking drive", but whose "[v]ocabulary, reasoning, information, judgment, concentration, attention, alertness, social understanding and new associative learning are all maintained at an average level." (Tr. 129).

8. Dr. Martin Rudoy, a specialist in psychiatry and neurology, examined Santangelo on May 8, 1975 and concurred with the findings of Dr. McHugh (Tr. 134). Dr. Rudoy felt that, based upon his evaluation of Santangelo's psychiatric condition, Santangelo's residual capacity to perform varied tasks on a sustained basis was fair (Tr. 135-136).

9. Dr. Charles P. Fonda, a clinical psychologist, who observed Santangelo on March 13, 1975 at his administrative hearing and who had reviewed all of the exhibits presented at Santangelo's hearing, including the aforementioned reports of Drs. Abeles, Illovsky, and Pross, testified as a vocational expert (Tr. 45-51, 116-118). He felt Santangelo was employable in "an occupation that entails less responsibility, less communication, less interaction with other people, than was the case in his previous work" (Tr. 48). He said that such jobs as sorting clerk, insurance clerk, mail clerk or power press tender were suitable for Santangelo and that such jobs were numerous in the New York area (Tr. 49-51). When cross-examined by Santangelo's representative at the hearing, Mr. Loosen from the Disabled American Veterans, Dr. Fonda stated that all of the occupations he listed were within the capabilities of a man Santangelo's age (Tr. 37, 51).

10. As of the date of the administrative hearing Santangelo was not receiving regular psychiatric treatment (Tr. 37).

11. Any of the aforementioned evidence that supports Santangelo's contention that he is disabled by his psychiatric problems is contraverted by the statements he made to Dr. Turkell and transcribed by the doctor in his report on May 28, 1975 (Tr. 124-125).

ARGUMENT

POINT I

The Secretary's Determination That Santangelo Was Not Entitled To Disability Benefits Is Supported by Substantial Evidence In The Record And Should Be Affirmed.

On appeal, Santangelo raises basically three issues. *First*, he argues that the Secretary's decision is not supported by substantial evidence. *Second*, he claims that the Secretary did not properly consider his subjective complaints, the combined effects of his alleged impairments and the Veterans Administration's determination that he was unemployable. And *third*, he contends that the Secretary improperly relied on the testimony of the vocational expert. In Point I of this brief, we will respond to the first and second claims raised by Santangelo, while in Point II we will deal with his third contention.

In order to establish entitlement to a period of disability insurance benefits, a claimant has the burden of establishing that he is *unable to engage in substantial gainful activity* by reason of a physical or mental impairment, which (1) can be expected to result in death or which has lasted or can be expected to last for a continuous period of at least 12 months and (2) the existence of which is demonstrated by evidence supported by objective data obtained by medically acceptable clinical and laboratory techniques, at a time when he met the insured status requirements of the Social Security Act.

42 U.S.C. § 423(d); *Reyes-Robles v. Finch*, 409 F.2d 84 (1st Cir. 1969); *Henley v. Celebrezze*, 394 F.2d 507 (3d Cir. 1969); *Franklin v. Secretary of Health, Education and Welfare*, 393 F.2d 640 (2d Cir. 1968). A finding by the Secretary, if supported by substantial evidence, that a claimant is not entitled to disability benefits is conclusive and cannot be disturbed by a court reviewing the Secretary's determination under 42 U.S.C. § 405(g). *Richardson v. Perales*, 402 U.S. 389 (1971). We submit that in this case the record shows that the Secretary's finding that Santangelo was not afflicted with a disability which kept him from engaging in substantial gainful activity is supported by substantial evidence.

For a claimant to be disabled within the meaning of the Social Security Act it is insufficient merely to show an impairment. Such impairment must preclude him from engaging in any substantial gainful activity. Factors to be taken into account in determining whether an impairment constitutes a disability within the meaning of the Social Security Act are (1) medical data and findings; (2) expert medical opinion; (3) subjective complaints and (4) the claimant's age, educational background and work history. *Gold v. Secretary of Health, Education and Welfare*, 463 F.2d 38, 41 (2d Cir. 1972). The record here shows that neither individually nor taken together do any of Santangelo's alleged impairments amount to a condition of sufficient severity so as to allow him to receive disability benefits under the Act.

There is no doubt that Santangelo has certain physiological problems involving his hearing and his back. However, they are of little significance. As to his hearing he retains the ability to hear, both with and without his hearing aid, as attested to by Dr. Rudoy and Dr. Turkell (Tr. 134, 124-128); while the claim of debilitating effects from his back problems is not supported by the evidence or record. Despite Santangelo's testimony

of how his sciatica incapacitates him from all activities, ~~which he~~ still retains, by his own admission, the functional capability to cook for himself, go outside unassisted, socialize with friends, and travel to Latin America (Tr. 54, 102-103, 125). Santangelo even specifically admitted that "[my] back would not stop me from working" (Tr. 125).

Santangelo's psychiatric impairments, however, are not quite as easily dispatched as a basis for disability benefits, since both his testimony concerning his subjective psychiatric complaints and medical evidence of record support the contention that he does in fact have a psychiatric impairment. However, it is the Secretary's position that whatever psychiatric impairment Santangelo does have is not of sufficient severity to preclude him from substantial gainful employment.

The psychiatrists and psychologists who examined Santangelo have variously diagnosed him as having "anxiety neurosis" (Tr. 112), "psychophysiologic disorder of special sense (hearing)" (Tr. 96), or "an adjustment reaction of adult life." (Tr. 134). However, it should be noted that Santangelo's psychiatric problems do not greatly interfere with his daily activities. Santangelo socializes with friends, watches television, travels overseas, reads, goes outside unassisted, and admitted to Dr. Turkell that he was "fit as a fiddle." (Tr. 124). These are hardly the actions of one who is incapacitated by reason of psychiatric problems. Moreover, Santangelo's responsiveness during his administrative hearing, an obviously stressful situation, belies his assertion that he is disabled for psychiatric reasons. Further, Dr. Abeles found "no evidence of delusional thinking, no hallucination, no impairment of memory or judgment", and Dr. McHugh found Santangelo's "[v]ocabulary, reasoning, information, judgment, concentration, attention, alertness, social understanding and new associative learning all

maintained at an average level." (Tr. 129). Finally, Dr. Rudoy thought Santangelo retained a fair residual capacity to perform varied tasks on a sustained basis, and Dr. Illovsky opined that psychotherapy would alleviate Santangelo's condition (Tr. 97).

It is conceded by the Secretary that severe psychiatric problems, but not the usual anxieties, phobias, and neuroses suffered by most individuals, can be the basis for granting disability benefits, if in fact the psychiatric problems preclude one from substantial gainful employment. However, in this case Santangelo's daily activities and the evaluations of his functional capacity given by the examining psychologists and psychiatrists overwhelmingly support the Secretary's conclusion that Santangelo is not disabled and thus not entitled to disability benefits.

In addition, Dr. Fonda, the psychologist and vocational expert, was ^{of} the opinion that Santangelo could work provided he found a job that entailed less responsibility and interaction with other people (Tr. 48).

In response to Santangelo's contention that the Secretary never considered his subjective complaints, the combined effects of his alleged impairments and the Veterans Administration determination that he was unemployable, it should be pointed out that the administrative record does not support the claim. First of all, the Administrative Law Judge took affirmative steps to develop the medical evidence when the medical evidence presented at Santangelo's hearing did not support the subjective complaints (Tr. 12, 44). We submit that this demonstrates that the judge did consider the subjective complaints, because, only after considering them, would he be in a position to determine that further medical evidence was necessary. Secondly, as the judge found (Tr. 14) (a finding fully supported by the record) Santangelo had no disabling physical impairments. Thus, it is incorrect to

speak of their being a "combined effect" from multiple impairments. There was only one impairment of any significance, Santangelo's⁶ psychiatric condition. Finally, it was the Administrative Law Judge who requested more complete reports from the Veterans Administration and stated for the record that "I see a very agitated man moving constantly in front of me have . . . I see the Veterans Administration has rated him 50 per cent for an anxiety neurosis." (Tr. 44). It thus cannot be argued that the Administrative Law Judge failed to consider the Veterans Administration report.⁶

POINT II

It was proper for the Secretary to consider the testimony of the vocational expert.

Santangelo further claims that the Secretary placed improper reliance on the testimony of Dr. Fonda, the vocational expert. He bases the contention on the argument that Dr. Fonda did not consider all of the evidence and that there was no factual basis for his opinion. We submit that these arguments are without merit.

It is conceded that, when giving his opinion that Santangelo could work, Dr. Fonda did not review the medical evidence received subsequent to the hearing and based his opinion solely on Exhibits 1 through 28 (essentially, the reports of Drs. Abeles, Illovsky and Pross) and Santangelo's testimony. However, it should be noted that the exhibits that Dr. Fonda did review contain the medical reports most favorable to Santangelo's claim for benefits. Both Dr. Abeles' and Dr. Illovsky's psychiatric

⁶ As noted above in footnote 4, a determination as to disability made by another agency is not binding on the Secretary. 20 C.F.R. § 404.1525 and 404.1526.

reports were reviewed by Dr. Fonda. Each report found Santangelo incapacitated by his psychiatric condition. The reports of Dr. Pross, Santangelo's treating general practitioner, likewise supported Santangelo's contentions concerning both his physiological and psychiatric conditions. Thus, it is clear that Dr. Fonda took into account both the physical and mental aspects of Santngelo's condition, and that, in so doing, he considered evidence most favorable to Santangelo. Accordingly, there is no basis for the claim, at least from Santangelo's standpoint, that Santangelo was prejudiced because Fonda only considered part of the evidence.

Similarly without merit is the claim that Dr. Fonda's conclusions with respect to the employability of Santangelo were not supported by substantial evidence. In deciding that Santangelo was capable of other work, Dr. Fonda had before him, first of all, the report of Dr. Illovsky which, although finding that Santangelo suffered from a psychiatric condition, described Santangelo as a "man who was verbally productive, relevant and coherent" and whose psychiatric problems could be alleviated by treatment (Tr. 96-97). In addition, Dr. Fonda read and considered Dr. Abeles' report, which found "no evidence of delusional thinking, no hallucination, no impairment of judgment." (Tr. 112). Further, and of particular importance, is the fact that Dr. Fonda observed Santangelo during the administration hearing. Thus, Dr. Fonda was able to determine that Santangelo's thinking appeared clear and that the partial hearing loss and back problems were not greatly incapacitating. (Tr. 48). Finally, Dr. Fonda reached his conclusion that Santangelo could work only after investigating, through published reports and interviews, the availability and requirements of jobs in the local economy and after considering Santangelo's training and experience as an analyst. (Tr. 46-47, 49). He thus had a sound basis when he expressed the opinion that there was suitable work of a clerical nature available for Santangelo.

In conclusion, we submit that the Secretary's determination is reasonable and should be affirmed by this court under the substantial evidence rule. Act § 205(g). *Richardson v. Perales*, 402 U.S. 389 (1971); *Levine v. Gardner*, 360 F.2d (2d Cir. 1969).

CONCLUSION

The order of the district court should be affirmed.

Dated: Brooklyn, New York
November 2, 1977

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

Dolores Byrd

being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 7th day of November 1977 he served a copy of the within

Brief for the Appellee

by placing the same in a properly postpaid franked envelope addressed to:

Marc L. Ames

11 Park Place

New York, N.Y. 10007

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City of New York.

Dolores M. Byrd

Sworn to before me this

7th day of November

1977

Barbara Allen

BARBARA A. ALLEN
Notary Public, State of New York
No. 24-4646824
Qualified in Kings County
Commission Expires March 30, 1979